AUG 16 1951
CHARLES ELMORE CROPLE
CLERK

IN THE

# SUPREME COURT OF THE UNITED STATES.

FRUEHAUF TRAILER COMPANY, a Corporation,
Petitioner,
vs.
ANNA GUSEWELLE, Administratrix of the Estate of Earl Gusewelle, Deceased,
Respondent.

No. 246

## PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
for the Eighth Circuit

and

## BRIEF IN SUPPORT THEREOF.

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## PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Comes now Fruehauf Trailer Company, a corporation, and respectfully petitions this Honorable Court to grant a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Eighth Circuit, rendered and entered on the 3rd day of July, 1951, in the cause lately pending in said Court of Appeals, entitled "Fruehauf Trailer Company, a corporation, Appellant, versus Anna Gusewelle, Administratrix of the Estate of Earl Gusewelle, deceased, Appellee," being cause number 14,301 of the civil causes on the docket of said Court of Appeals, affirming a judgment of the United

States District Court for the Eastern Division, Eastern District of Missouri, in said cause, said judgment of the District Court being against your petitioner (defendant below) and in favor of respondent (plaintiff below).

## OPINION OF THE COURT BELOW.

The opinion of the United States Court of Appeals for the Eighth Circuit in the cause of "Fruehauf Trailer Company, a corporation, Appellant, versus Anna Gusewelle, Administratrix of the Estate of Earl Gusewelle, deceased, Appellee," of which opinion petitioner here seeks review, appears on pages 94 to 100, inclusive of the record filed herewith. Said opinion has not as yet been published.

## SUMMARY STATEMENT OF THE MATTER INVOLVED.

The original suit from which this proceeding arises was instituted by Anna Gusewelle, Administratrix of the Estate of Earl Gusewelle, deceased, against Fruehauf Trailer Company, a corporation, seeking to recover for the allegedly wrongful death of said Earl Gusewelle. Respondent Anna Gusewelle, Administratrix, is the widow of Earl Gusewelle, deceased, whose death resulted from a collision between an automobile transport driven by Earl Gusewelle and a tractor-trailer unit operated by the petitioner (R. 23). The collision occurred on Highway No. 112, an open and public highway in the State of Michigan (R. 21).

On December 22, 1949, an amended complaint was filed, upon which the cause was tried in the District Court (R. 1 to 5, inclusive). Said amended complaint alleges, among other things, that the petitioner, Fruehauf Trailer Company, failed to operate its tractor-trailer combination upon its right half of the highway, in violation of the

provisions of Section 4703, Compiled Laws of Michigan 1929, as amended, and "negligently caused, allowed and permitted its said tractor-trailer truck to suddenly veer to the left side of the highway and to the south of the center line of said highway into and against the front end of the truck being driven by Earl Gusewelle" (R. 2-3).

Section 4703, Compiled Laws of Michigan 1939, as amended, mentioned above, is as follows:

> "Upon all highways of sufficient width except upon one-way streets, the driver of a vehicle shall drive the same upon the right half of the highway and shall drive a slow moving vehicle as closely as possible to the right-hand edge or curb of said highway, unless it is impracticable to travel on such side of the highway and except when overtaking and passing another vehicle subject to the limitations applicable in overtaking and passing set forth in Sects. 13 and 14 of this Act; provided, however, that on highways having three or more lanes for traffic, the driver of a vehicle shall keep the same entirely within the extreme right-hand lane except when overtaking and passing and when turning left; provided further, that on highways having three or more uneven number of lanes, the driver of a vehicle shall not drive the same or any part thereof to the left of the center lane and on highways having four or more even number of lanes, he shall not drive the same or any part thereof to the left of the center line; provided further, that, with respect to highways having four lanes or more, vehicles moving in substantially continuous lines of traffic may pass either to the left or right of preceding vehicles which occupy adjacent lanes. The foregoing rules shall apply on highways divided by a center parkway, walk, other structures or traffic control device, except that on such highways, drivers

shall keep to the right of such parkway, walk, other structure or traffic control device'' (R. 2).

In addition to denying the allegations of negligence in the amended complaint, appellant's answer contained a plea of contributory negligence on the part of deceased. It was also alleged in the answer that the driver of appellant's equipment was confronted by a sudden emergency, created by the manner in which a westbound automobile was operated, and that the conduct of appellant's driver thereafter did not constitute negligence (R. 6 to 9).

The evidence tended to show that about 8:45 a. m. on June 21, 1947, Earl Gusewelle, an employee of Cassens Transport Company (R. 24), was driving a tractor-trailer eastwardly on Highway No. 112, an east and west highway, in the State of Michigan, en route to Detroit. At a point a mile and a half or two miles east of the town of White Pigeon, the equipment driven by Gusewelle was involved in a collision with a tractor-trailer unit of the petitioner, which was being operated westwardly (R. 24). The concrete pavement of the highway consists of two lanes, each lane being 9 or 10 feet wide, with shoulders 3½ to 4 feet wide. The distance from each shoulder to a bordering fence was shown to be 25 or 26 feet (R. 24). Six large trees, in a row east and west, were shown to be located 10 or 12 feet north of the north shoulder (R. 48, 65). The day was clear and the road was dry. The road is straight and level for a distance of at least half a mile east and west of the point of accident (R. 24). Earl Gusewelle was driving his equipment at a speed of approximately 45 miles per hour (R. 47), and was being followed, at a distance of about 300 yards, by another tractor-trailer outfit of Cassens Transport Company driven by Gordon King (R. 46). Another tractor-trailer outfit of Cassens Transport Company, driven by Charles Baierlein, was about three-fourths of a mile to the rear of that driven by Gordon King (R. 48).

Petitioner's tractor-trailer unit was operated at a speed of between 40 and 42 miles per hour (R. 25), and was followed by a tractor-trailer unit of Express Freight Lines driven by James Ballard (R. 24). Ballard was driving his outfit at a speed of about 45 miles per hour and was gradually overtaking appellant's equipment. When a distance of between 300 and 400 feet separated Ballard's equipment and that of petitioner, a westbound 1938 model automobile passed Ballard. At that time, Ballard observed a truck approaching from the opposite direction and quite a distance away (R. 25). The automobile started to turn into the westbound lane in front of Ballard (R. 25). It got partially into that lane and after traveling 50 to 100 feet in that position (R. 45) it continued so as to pass petitioner's equipment (R. 25). Ballard said that "I was wondering why the driver of the private automobile would take off around this Fruehauf outfit, because I'd seen this truck coming; so I pulled out on the line so I could see around the outfit, and, well, it looked like there was going to be something happening so I dropped back slightly" (R. 25). On cross-examination, Ballard said he was surprised at the attempt of the driver of the automobile to pass the petitioner's outfit, by which he meant "that this oncoming Cassens tractor and trailer were so close that there was some question in my mind about the automobile being able to negotiate that passing" (R. 45). Ballard said that he had followed petitioner's equipment for about four miles, and that until the time the automobile started to cut in front of it, petitioner's equipment was being operated on the proper side of the highway (R. 45).

Ballard testified that he saw the outfit driven by Earl Gusewelle starting to pull off the road and that at that particular time the passenger car cut in front of petitioner's outfit and into the westbound lane; that he could not see whether there was any contact between the auto-

mobile and petitioner's outfit, but expressed the opinion there was none; that "I had slowed down when I saw this car cut in there," and after petitioner's trailer blocked his view of the automobile, "the next thing I saw the Fruehauf outfit cut diagnolly across the road, I would say at about a 45 degree angle, across the eastbound lane. Just at the moment the Fruehauf outfit started swinging over the highway I would say there wasn't over 40 to 60 feet separating it and the Cassens Transport" (R. 26). He was 400 or 450 feet east of petitioner's equipment when the collision occurred (R. 26). The rear wheels of the tractor of petitioner's equipment were just about at the south edge of the pavement and its front end was 7 or 8 feet south of the pavement when the collision occurred (R. 26). The front of the Cassens tractor struck petitioner's tractor about at the door. The tractors stopped about where they collided. Flames burst forth from the tractors and rescue of the drivers was impossible (R. 27). The westbound automobile stopped beyond the wreck, its driver got out and looked in the direction of the wreck, but drove away when the fire started (R. 27). The identity of the driver of the automobile was not ascertained (R. 27).

Ballard had a camera with him and made several pictures of the wreck. Those pictures are identified as Plaintiff's Exhibits 1 to 8, inclusive, are described on pages 26 and 28 of the printed record, and appear at pages 29, 31, 33, 35, 37, 39, 41 and 43 of that record.

Gordon King, following Gusewelle, testified that he did not see petitioner's outfit, or the westbound automobile, until Earl Gusewelle had pulled to the right side of the road, and petitioner's outfit then was occupying the north side of the roadway; that "and the next thing, why he (automobile) had cut across in front of the Fruehauf, the automobile was in the act of passing and cutting in front of the Fruehauf. After cutting around, the automobile got

in front of the Fruehauf vehicle and on back into the westbound lane. No more than the car had straightened out in front of the Fruehauf, why, he (petitioner's outfit) ducked right across in front of Earl Gusewelle; he cut across at an angle to the south" (R. 46). He did not notice any contact between the automobile and petitioner's tractor-trailer (R. 46). He said that immediately before petitioner's tractor started to cross the highway, the distance from the front of that tractor to the front of the one driven by Earl Gusewelle was 50 or 60 feet (R. 47), and at that time the left rear wheels of the trailer of Gusewelle's outfit were just barely on the concrete (R. 46, 47).

Ballard said there were skid marks, made by the tires of the left rear dual wheels of petitioner's tractor, which began just north of the center of the pavement, extended westwardly about four feet, and then turned over across the eastbound lane. The tires of petitioner's trailer did not make any marks on the pavement (R. 27). On cross-examination, Ballard said he could see that petitioner's driver had applied brakes; that petitioner's tractor and trailer apparently went out of control immediately; that the skid marks indicated the tractor brakes were on; that "this thing occurred very quickly" (R. 45). King said there were skid marks on the pavement made by petitioner's tractor, which extended from the north side of the highway, where the brakes had been applied, across the pavement on the south side to within two or three feet of the edge of the pavement (R. 47). On cross-examination, he said that he saw four skid marks on the pavement "for the distance until it got into a cramp, until the tractor had cramped, and the marks started on the Fruehauf side of the highway." He did not notice any application of the brakes of Gusewelle's outfit. On redirect examination, he said that there were four tires on the rear of petitioner's tractor and that he saw four separate skid marks from four different tires (R. 47).

Charles Baierlein testified, on direct examination, that the wreck was ablaze when he arrived at the scene. He was asked this question: In the course of looking around there, did you notice any tire marks or skid marks on the pavement? His answer was: Where he jack-knifed, he hit that tar place and jack-knifed, no trailer brakes whatsoever. His description of the marks he saw on the pavement was: Well, it definitely was a tractor mark that was on the pavement because there was two dual wheels and two single wheels and the trailer, I'm almost sure never crossed (R. 48).

At the conclusion of respondent's evidence, petitioner, by its counsel, filed a motion for a directed verdict in its behalf or for a dismissal of respondent's cause of action (R. 49). In support of that motion, petitioner contended, among other things, that respondent had failed to establish negligence on the part of petitioner. After hearing the argument of counsel on said motion, the court reserved a ruling thereon (R. 49-64). At the close of all the evidence, petitioner again filed its motion for a directed verdict in its behalf, or for a dismissal of respondent's cause of action, and, in connection therewith, requested the court to consider the argument advanced in support of the motion filed at the close of respondent's evidence. The motion filed at the close of all the evidence was denied (R. 67). The jury returned a verdict in favor of respondent in the sum of $38,000.00, and the District Court entered judgment in accordance therewith (R. 78, 79).

After an unavailing motion for judgment notwithstanding the verdict, or, in the alternative for a new trial, petitioner perfected its appeal to the United States Court of Appeals for the Eighth Circuit (R. 80, 85).

In said Court of Appeals the cause was argued on May 7, 1951, submitted upon arguments of counsel and briefs,

and was taken under advisement (R. 93, 94). Thereafter, on July 3, 1951, said Court of Appeals filed an opinion in said cause written by the Honorable Joseph W. Woodrough, Circuit Judge, and concurred in by the Honorable Seth Thomas and the Honorable Harvey M. Johnsen, Circuit Judges.

In said opinion the Court of Appeals stated in part (R. 98) that "An emergency is merely one of the circumstances to be considered by the jury in determining if the party's course of action was one that an ordinarily prudent man would have followed." The Court of Appeals recognized the evidence relied upon by petitioner as creating a state of emergency, in language as follows:

> "That 'emergency' which is appellant's only reliance here is claimed to have come about as follows: The trucks of plaintiff's decedent and of defendant were approaching one another, each proceeding on its proper side of the road. A 1938 model automobile began to pass defendant's truck. Plaintiff's decedent saw the automobile begin to pass defendant's truck, and he began to pull his truck further to his right onto the south shoulder of the highway. The automobile passed defendant's truck and turned in again onto its proper lane in front of defendant's truck. The automobile did not touch the truck, but continuing at the rate of speed at which it passed the truck, pulled away from it, and its driver was never identified.
>
> "Defendant's driver, however, when he saw the automobile in front of him, jammed on his tractor brakes but not his trailer brakes, and the trailer 'jackknifed' across the highway and crashed into the truck driven by plaintiff's decedent. The defendant's contention is that this set of facts, as a matter of law, established such an emergency that the defendant's

driver was legally excused from any liability arising out of the accident" (R. 97).

The Court of Appeals held (R. 99, 100) that the issues thus presented were factual, were properly presented to a jury for determination, and that the evidence supported the jury's verdict. Judgment of the Court of Appeals was entered on July 3, 1951, in accordance with the opinion, affirming the judgment of the District Court (R. 100).

## JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES.

The jurisdiction of this Honorable Court is based upon Title 28, United States Code, Sections 1254 (1) and 2101 (c) (28 U. S. C. A., §§ 1254, 2101), and upon Rule 38, Section 5 (b) of the Rules of this Court, providing for review by writ of certiorari of judgments in cases in which a Court of Appeals has rendered a decision in conflict with the decision of another Court of Appeals on the same matter, or has decided an important question of local law in a way probably in conflict with applicable local decisions.

Judgment of the Court of Appeals was entered on July 3, 1951, and on July 18, 1951, petitioner filed in said Court its Motion to Stay Issuance of Mandate (R. 102, 100). On July 19, 1951, said Court ordered its mandate stayed for a period of thirty days pending filing of this petition in this Court within said time (R. 103, 101).

## QUESTIONS PRESENTED.

The questions presented by petitioner's petition for a writ of certiorari are as follows:

1. Upon undisputed facts showing that on a two-lane concrete highway a westbound passenger automobile

passed and suddenly turned in front of petitioner's westbound tractor-trailer in close proximity thereto; that the apparent proximity of these vehicles to the one operated eastwardly by Earl Gusewelle was such as to cause said Earl Gusewelle to drive his automobile convoy truck toward and partly upon the south shoulder of the roadway in an attempt to avoid a collision; that when said passenger automobile suddenly turned in front of petitioner's tractor-trailer assembly the driver thereof immediately applied the brakes of said tractor, causing the assembly to "jackknife," veer across the center line, and be struck by the truck operated by Gusewelle; quaere, is the opinion of the Court of Appeals for the Eighth Circuit, holding that a question for determination by a jury was thereby presented, in conflict with the decisions of the Court of Appeals for the Seventh Circuit, in Pickering v. Corson, 108 Fed. (2) 546, and in Greyhound Lines, Inc., v. Noller, 36 Fed. (2) 443, both holding upon similar states of facts that an "emergency" was created as a matter of law, and that there was no showing of negligence sufficient to submit for decision by a jury?

2. Upon the facts above hypothesized, quaere, is the opinion of the Court of Appeals for the Eighth Circuit, holding that a question for determination by a jury was thereby presented, in conflict with applicable local law and the decision of the Supreme Court of Michigan in Kalso et al. v. Wilson, 252 Mich. 520, 233 N. W. 401, holding upon practically identical facts that an "emergency" was created as a matter of law, and that there was no showing of negligence sufficient to submit for decision by a jury?

## REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

This cause was submitted to a jury upon a single assignment of negligence against petitioner; a negligent violation of the Michigan statute requiring drivers to operate automotive vehicles upon the right half of the highway. It was undisputed in evidence that petitioner's tractor-trailer had crossed the center line of the highway, and that the collision between petitioner's vehicle and that operated by decedent, Earl Gusewelle, occurred on the left-hand side of the center line (with respect to petitioner's vehicle).

All of the witnesses, including the only eyewitnesses to the collision, were called to the stand by respondent. Petitioner's driver was killed in the accident, and petitioner's only evidence was a photograph (R. 65) taken by one of the eyewitnesses. Thus there was no conflict in the evidence as to the manner in which the accident occurred.

Upon the undisputed facts shown in respondent's evidence, the Court of Appeals for the Eighth Circuit held that whether or not an "emergency" existed, excusing petitioner's employee for applying the brakes of his tractor, causing the same to veer to the left side of the highway, was properly submitted for decision by a jury in the District Court.

The United States Court of Appeals for the Seventh Circuit has twice ruled upon cases involving strikingly similar sets of facts. In said cases (Pickering v. Corson, 108 Fed. [2] 546; Greyhound Lines, Inc., v. Noller, 36 Fed. [2] 443) the Court of Appeals for the Seventh Circuit in each instance reversed judgments of the District Courts in favor of plaintiff, and held and decided that such circumstances created an emergency as a matter of law, exonerating the respective defendants of negligence in oper-

ating their vehicles into the left-hand side of the roadway. And in Kalso et al. v. Wilson, 252 Mich. 520, 233 N. W. 401, the Supreme Court of Michigan, upon practically identical facts, affirmed the action of the trial court in directing a verdict for defendant, holding that in an emergency thus created, there was no proof that defendant did not exercise due care.

We respectfully submit as sufficient reason for granting the writ that the decisions of the respective Courts of Appeals should be harmonious among themselves in cases decided upon like or analogous facts, and where consistent with the laws and Constitution of the United States, should harmonize with the application of statutes by the highest Court of the State affected. The opinion of which review is here prayed is not consistent either with the decisions of the Court of Appeals for the Seventh Circuit, or the applicable local law as contained in the above-cited opinion of the Supreme Court of Michigan which, under the decision of this Court in Erie R. Co. v. Tompkins, 58 S. Ct. 817, 304 U. S. 64, 82 L. Ed. 1188, 114 A. L. R. 1487, the Circuit Court of Appeals was obliged to follow.

Nor is the present case likely to be a single, isolated, or unimportant instance. The political boundaries created by state lines are not economic boundaries. Commercial intercourse and interchange of traffic is full and free between the important industrial centers embraced within the Seventh and Eighth Judicial Circuits. The United States Court of Appeals for either Circuit is frequently called upon to decide cases arising within the other Circuit. It is therefore of general concern to every person or organization using the highways of a state within either Circuit, to have the laws of that State uniformly applied by the States' own Courts, and by those United States Courts of Appeals having occasion to interpret and apply those laws.

## PRAYER FOR THE WRIT.

Wherefore, petitioner prays that a writ of certiorari be issued by this Honorable Court, directed to the United States Court of Appeals for the Eighth Circuit, to the end that the opinion and judgment of said Court of Appeals in the cause entitled "Fruehauf Trailer Company, a corporation, Appellant, v. Anna Gusewelle, Administratrix of the Estate of Earl Gusewelle, Deceased, Appellee," Number 14,301 in said Court of Appeals, be reviewed by this Court as provided by law, and that the judgment of the United States Court of Appeals for the Eighth Circuit in said cause be reversed, and that petitioner have such other relief as to this Honorable Court may seem meet and proper.

JOHN S. MARSALEK,
Attorney for Petitioner.

MOSER, MARSALEK, CARPENTER,
CLEARY & CARTER,
Of Counsel.

## BRIEF.

The statement of the **grounds of jurisdiction** of this Court, reference to the **opinion below**, and the **summary statement of the case** are set forth in the foregoing petition for writ of certiorari, and in the cause of brevity are not repeated here.

## SUMMARY OF THE ARGUMENT AND AUTHORITIES.

I.

The opinion of the United States Court of Appeals for the Eighth Circuit is in conflict with the opinions of the United States Court of Appeals for the Seventh Circuit in

Pickering v. Corson (7th Cir.), 108 F. (2) 546;
Greyhound Lines, Inc., v. Noller (7th Cir.), 36 F. (2) 443.

II.

(a) The opinion of the United States Court of Appeals for the Eighth Circuit is in conflict with local law as declared by the Supreme Court of Michigan, in which state respondent's purported cause of action arose, in

Kalso et al. v. Wilson et al., 252 Mich. 520, 233 N. W. 401.

(b) The Circuit Court of Appeals was obliged to follow the law as announced by the Supreme Court of Michigan in Kalso et al. v. Wilson et al., supra.

Erie R. Co. v. Tompkins, 58 S. Ct. 817, 304 U. S. 64, 82 L. Ed. 1188, 114 A. L. R. 1487.

## ARGUMENT.

There is no dispute as to the evidence in this case. Earl Gusewelle was operating a truck eastwardly on Highway No. 112 in Michigan (R. 24) at a speed of approximately 45 miles per hour (R. 47). Petitioner's employee was driving westwardly at a speed of from 40 miles per hour to 42 miles per hour (R. 25). Simple arithmetic shows that they were approaching each other at a relative speed of approximately 120 to 130 feet per second. As they drew nearer to each other, a private passenger automobile, westbound, passed petitioner's truck (R. 25). Gusewelle, who was in a position to see both oncoming vehicles, quickly headed his truck for his right-hand shoulder of the road (R. 25). As he started to pull off of the road, the passenger car "cut in front of the Fruehauf outfit" (R. 25). The Fruehauf truck veered diagonally across the center line of the road (R. 26), and skid marks on the highway indicated that the brakes on the Fruehauf tractor had been applied, but not the trailer brakes (R. 48). As the Fruehauf assembly started to cut across the highway, the distance between petitioner's assembly and Gusewelle's was 40 to 60 feet (R. 26).

At the time petitioner's driver acted, having but 40 to 60 feet between his truck and Gusewelle's (R. 26), he had expressed in terms of time, some ⅓ to ½ second, at their combined speeds of 120 to 130 feet per second. Between the two heavy vehicles was a passenger automobile, cutting from one side of the road to the other. Upon these facts, the District Court refused to declare that petitioner's driver was faced with an emergency, and instead, instructed the jury that it was for the panel to determine whether the driver had acted with that degree of care and caution which an ordinarily careful and prudent person would exercise under the same or similar circumstances (R. 70). The Court of Appeals for the Eighth Circuit

agreed that the issues were factual (R. 99) and affirmed the judgment of the District Court. In so doing, the Court of Appeals failed to view the situation as the undisputed evidence shows it was presented to petitioner's driver, who was called upon to act without an opportunity to exercise that precision and accuracy of judgment which might be required under different, and more favorable, conditions and circumstances. (Greyhound Lines, Inc., v. Noller, 36 F. 2d 443.)

We earnestly present that there is a clear conflict between opinions of the Courts of Appeals for the Eighth Circuit and the Seventh Circuit, and in opinions of the Eighth Circuit and the applicable local law, sufficient to justify and require the examination of the law by this Court.

1. The facts presented to, and opinion of, the United States Court of Appeals for the Seventh Circuit, submitted as being in conflict with the instant opinion of the Eighth Circuit, are briefly as follows:

In **Pickering v. Corson** (7th Cir.), 108 F. 2d 546, the defendant was driving eastwardly on an open, paved highway and the plaintiff was driving westwardly. As the two automobiles approached each other, a Ford automobile, also traveling eastwardly, passed defendant's car, cut in front of it, struck the left front end of defendant's automobile, deflecting its course onto a patch of loose, sticky, tarred gravel. The defendant was thereafter unable to steer her automobile, and it crossed over the center line to the north and collided with the plaintiff's automobile. The Ford continued on, and the driver was never apprehended. The motions for a directed verdict tendered by the defendant at the close of the plaintiff's case and again at the close of all the evidence were denied by the trial court. The jury returned a verdict for the plaintiff and judgment was entered thereon. The judgment was reversed on appeal, the court saying (l. c. 548):

"Our case comes to this: Defendant, driving her automobile eastward on an open-paved highway, in the accustomed lane of traffic, with care and caution for the safety of all persons on the highway, is suddenly struck by a Ford sedan, throwing defendant's automobile off the road upon loose, sticky, tarred gravel, forcing her to lose control of her automobile so that it runs in an instant diagonally across the highway into the path of plaintiff's automobile, injuring her. Where is the absence of care? What did she omit to do, which a reasonable person would have done? Or what did she do, which a prudent and reasonable person would not have done? So far as appears, defendant is blameless. There is not the slightest evidence tending to show any negligence on her part. This record is too speculative, in view of the uncontradicted proof, to justify holding her liable for negligence."

The only difference between the facts in the Pickering opinion above quoted and the opinion in the case at bar is this: that in the Pickering case there was physical contact between the two eastbound vehicles, whereas in the instant suit there was close and dangerous proximity without physical contact. Is the single factor of "collision, or no-collision" a sufficient or valid distinction in law? If it is considered as a valid distinction, that is tantamount to holding that an "emergency" is only created after vehicles collide. We respectfully insist that such a "distinction" is not a valid one in law, in logic, or in the common experience of mankind. For instance, assume that a small child runs from between two parked cars, some 15 or 20 feet in front of an oncoming driver. The reflex action of the driver is to apply his brakes and attempt to avoid striking the child. Assume further that, as a result of rapid braking, the driver's car skids across the center line of the street and into collision with a vehicle coming in the opposite direction. Can we logically say that if the

driver strikes the child, then he was confronted with an "emergency" excusing the subsequent collision, but if he manages to miss the child, then there was no "emergency" and he was negligent in getting onto the left side of the street? Such a decision would be a travesty on logic and an affront to justice. It would put a premium on doing nothing when confronted by a situation fraught with imminent peril to others, for to act, however quickly, would be only to create liability on one's self. The "collision" cannot be a valid distinction in law, yet the "collision" factor is the only difference between Pickering v. Corson (7th Cir.) and the decision in the Eighth Circuit here presented for review.

Another opinion of the United States Court of Appeals for the Seventh Circuit clearly recognizes that an "emergency" may be created by many other factors than the prior collision of two vehicles before plaintiff's involvement. In **Greyhound Lines, Inc., v. Noller** (7th Circuit), 36 F. (2) 443, plaintiff was driving his car westwardly at night, on his own side of a road. Defendant's bus was being driven eastwardly on its own side of the road. A third vehicle, which had been following defendant's bus, passed the bus, cut in front of it, and stopped suddenly, apparently to avoid colliding with an automobile parked partially on the road. The defendant's driver, in an attempt to avoid a collision with the passing vehicle, swerved to his left, across the center line of the road, and into the plaintiff's car. **There was no collision between the defendant's bus and the car which had passed it.** Verdict and judgment were in favor of plaintiff in the District Court, but the United States Court of Appeals for the Seventh Circuit reversed the judgment outright, holding that there was no evidence of negligence on the part of the defendant, and stated (l. c. 36 F. [2] 444):

> "Where one who is not otherwise at fault is confronted by an emergency, such as here shown, he is

not guilty of negligence, even though a deliberate judgment might have shown a better and safer course. Davis v. Chicago, R. I. & P. Ry. Co. (C. C. A.), 159 F. 10, 11, 16 L. R. A. (N. S.) 424."

Thus the Court of Appeals for the Seventh Circuit has held, in a case strikingly similar to both the case at bar and to the Pickering case, supra, that the collision of vehicles is not the sine qua non creating an emergency.

We respectfully submit that the cited opinions in the Seventh Circuit, and the instant opinion in the Eighth Circuit, are in irreconcilable conflict and require the intervention of this Court to review the record of the United States Court of Appeals for the Eighth Circuit, as hereinabove prayed. In each case the factual situation was created by the same movement of vehicles, the results were the same, and the only divergence is between the law written by the Courts of Appeals for the Seventh and Eighth Circuits.

2. Not only does the instant opinion conflict with prior decisions in the Seventh Circuit; it is also in direct opposition to the local law of Michigan. In Kalso et al. v. Wilson et al., 252 Mich. 520, 233 N. W. 401 (Supreme Court of Michigan), the plaintiffs were riding with the defendant as his guest at the time they were injured. Defendant was driving upon his proper side of the street. The accident occurred at night on a slippery street. A car was coming from the opposite direction toward the defendant; another car came from behind defendant, went by close to his car and cut in sharply ahead of him in order to avoid a collision with the car approaching from the opposite direction. It is pertinent to note that there was no contact between the passing car and defendant's automobile. The defendant immediately applied his brakes, and his car slid off the traveled portion of the highway, striking a telephone pole, causing the injuries of

the plaintiffs. At the conclusion of the testimony, the trial court directed a verdict for the defendant. That action of the trial court was affirmed on appeal, the Supreme Court of Michigan holding that defendant had been confronted with a sudden emergency by reason of the car cutting in ahead of him, that defendant had applied his brakes, and that under such circumstances there was no proof the defendant did not use due care. Under the decision of this Court in Erie R. Co. v. Tompkins, 58 S. Ct. 817, 304 U. S. 64, 82 L. Ed. 1188, 114 A. L. R. 1487, the Circuit Court of Appeals was obliged, but failed, to apply the law of Michigan as announced by the Supreme Court of that state in the cited case of Kalso et al. v. Wilson et al.

It is plain, we respectfully submit, that the Court of Appeals for the Eighth Circuit has, by its opinion here in question, come into conflict with the opinions of the Court of Appeals for the Seventh Circuit, and with the opinion of the Supreme Court of Michigan constituting the local law. All of the evidence was clear and uncontradicted. Under such circumstances the case would not have gone to the jury under the decisions hereinabove cited. In ruling to the contrary, the Court of Appeals for the Eighth Circuit is out of accord.

Petitioner therefore prays that this Honorable Court issue its writ of certiorari herein, and that the judgment of the United States Court of Appeals for the Eighth Circuit be reversed.

Respectfully submitted,

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